U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

Date: DEC 18 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting and development company. It seeks to employ the beneficiary permanently in the United States as a senior software engineer. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education or work experience stated on the labor certification. The director denied the petition accordingly.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The priority date of the petition is February 8, 2011, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The Immigrant Petition for Alien Worker (Form I-140) was filed on June 7, 2011.

Upon review of the entire record, including evidence submitted on appeal, the AAO concludes that the petitioner has established that it is more likely than not that the beneficiary had all the education specified on the ETA Form 9089 as of February 8, 2011. That portion of the director's decision is withdrawn.

However, the record does not establish that the beneficiary had the required five years of experience as a senior software engineer or in one of the alternate occupations listed in the ETA Form 9089.

In evaluating the requirements for the offered position, U.S. Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany* v. *Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Iwine, Inc.* v. *Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coorney*, 661 F.2d 1 (1st Cir. 1981).

USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Here, the DOL certified the ETA Form 9089 on February 11, 2011. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified, and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

The required education, training, experience, and special requirements for the offered position are set forth at Part H of the ETA Form 9089. Here, Part H shows that the position requires a bachelor's degree, or foreign educational equivalent, in computer science, engineering (any branch) and 60 months of experience in the job offered or in the alternate occupations of programmer, analyst, developer, consultant or similar occupation.

The beneficiary set forth his credentials on the labor certification and signed his name, under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he has worked as a senior software engineer for the petitioner from November 2007 through the date that the ETA Form 9089 was signed (March 15, 2011). He also claims to have worked as a project manager for [redacted] from April 2001 to October 2007 in Pune, India, and as a manager for [redacted] from April 1997 to April 2001. He additionally claims to have

worked as a network administrator for [redacted] from September 1993 to April 1997.

In support, the petitioner submitted a letter from [redacted] indicating that the beneficiary worked for [redacted] from April 2001 to October 2007 as a project manager and two letters from the [redacted], indicating he worked for that organization from 1993 to 1997.

In a request for evidence (RFE) dated June 20, 2011, the director noted that the "employment dates you have provided in ETA 9089 and dates submitted with I-140 is contradictory with the dates we have in record." In response to the RFE, counsel submitted an explanation of the inconsistencies along with a record of the dates of employment. Counsel claims that the beneficiary was actually employed by [redacted] from 2004 to 2010 and [redacted] from 2001 to 2004, even though this is inconsistent with both the ETA Form 9089 and the experience letter from [redacted] which claims that the beneficiary "ended his employment in October 2007." His employment with the petitioner did not allegedly begin until 2010, even though it is claimed in the ETA Form 9089 that his employment with the petitioner began in 2007.

The director denied the petition because "there is too many inconsistency in employment dates and is in contradictory within all three instances of filing [redacted] I-140 and response receive on request."

On appeal, counsel states that "the dates of employment was entered incorrectly in the Form ETA-9089 due to an inadvertent error." However, it is not clear how this error could have been made by the beneficiary when he signed the ETA Form 9089. The beneficiary's failure to apprise himself of the contents of the paperwork or the information being submitted constitutes deliberate avoidance and does not absolve him of responsibility for the content of his petition or the materials submitted in support. *See Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. *See Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993).

On appeal, counsel further states that the beneficiary worked for Syntel Ltd. (US) from October 2004 to April 2010. However, this employment is not listed on the ETA Form 9089. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the BIA notes that the beneficiary's experience, without such fact certified by the DOL on the beneficiary's ETA Form 9089, lessens the credibility of the evidence and facts asserted. *See also Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

> Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such

> inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The beneficiary's work experience letters do not provide independent, objective evidence of his prior claimed work experience. *See id.* Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Overall, the record is so rife with unsatisfactorily explained and unresolved inconsistencies surrounding the beneficiary's work experience that it cannot be concluded that he meets the requirements of the ETA Form 9089 or the advanced degree professional classification. The petitioner claims on appeal that the ETA Form 9089 contains an incorrect account of the beneficiary's experience, yet it submitted letters in support of the petition which square with this now repudiated list of work experience. Only after being called upon to reconcile this list of experience with inconsistencies in the record did the petitioner produce an entirely different version of the beneficiary's work experience history. This new version changed the beneficiary's start date with the petitioner by three years and claimed that the beneficiary actually worked in the U.S. for Syntel when such experience was entirely omitted from the ETA Form 9089. Therefore, the petitioner has not established that the beneficiary had the required five years of prior experience by the priority date.

Beyond the decision of the director, the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

According to USCIS records, the petitioner has filed numerous I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. The record is also devoid of any required evidence (i.e., annual reports, audited financial statements, or tax returns) pertaining to the petitioner's ability to pay the proffered wage beginning on the February 8, 2011 priority date. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.